United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2131

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILDRED IVES, MOIRA ROBERTSON & JOYCE CHAPMAN on behalf of themselves and others similarly situated, Plaintiffs-Appellees, vs. W.T. GRANT COMPANY Defendant-Appellant	Docket No. 74-2131

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AMICUS CURIAE

for

The Board of Governors of the Federal Reserve System

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Dated: April 4, 1975

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I. INTRODUCTION AND STATEMENT OF ISSUES

The Board of Governors of the Federal Reserve System has been asked to provide its views on the jurisdictional issues raised in the case of Ives v. W. T. Grant Co., Docket No. 74-2131. The issues raised in the case are as follows:

(1) Whether the Board had the authority to issue the regulation under challenge, 12 C.F.R. § 226.12(c), which provides, in effect, that Federal civil jurisdiction continues after the Board exempts specified transactions within a State from the requirements of Chapter 2 of the Federal Truth in Lending Act (15 U.S.C. § 1601 et. seq.).

We assert that the Act clearly indicates that civil jurisdiction of U. S. District Courts continues following the grant of an exemption. The Board was given broad regulatory authority to interpret the Truth in Lending Act to effectuate its purposes, and the challenged regulation should be sustained as a valid exercise of that authority.

(2) If a "partial" exemption for Connecticut was an invalid exercise of the Board's power, (a) does the exemption granted Connecticut fail entirely, leaving the Federal Truth in Lending law in full force and effect there, or (b) does only the retention of Federal civil jurisdiction exception to the full exemption fail, thus eliminating Federal

jurisdiction over the claims in the instant case and leaving the Connecticut Truth in Lending law in full force and effect.

We contend that if the exemption granted Connecticut were to be found an invalid exercise of the Board's authority, the whole exemption granted Connecticut must fail because the Board's finding that there was adequate provision for enforcement of the Truth in Lending Act was based on the assumption that Federal jurisdiction would remain. If this assumption is not correct, a detailed analysis of Connecticut's civil procedure rules would be a prerequisite to the continuation of Connecticut's exempt status, and therefore the exemption granted would fail.

(3) Finally, in response to the Court's invitation for the Board's views on other issues involved in this case, we would direct the Court's attention to the Board's view of the legal status of opinion letters written by its staff, since certain of these letters appear to be in issue.

II. THE FEDERAL RESERVE BOARD DID NOT EXCEED ITS REGULATORY AUTHORITY WHEN IT ISSUED REGULATION 12 C.F.R. § 226.12(c) WHICH SERVES TO CLARIFY THE FACT THAT FEDERAL JURISDICTION FOR ACTIONS UNDER THE TRUTH IN LENDING ACT (15 U.S.C. § 1601 et. seq.) CONTINUES AFTER A STATE HAS BEEN GRANTED AN EXEMPTION FROM CERTAIN REQUIREMENTS OF THE ACT.

A. The Plain Meaning Of The Statute Indicates That Federal Jurisdiction Is Intended To Remain After The Granting Of An Exemption From The Requirements Of Chapter 2 Of The Truth In Lending Act.

The Federal Reserve Board (hereinafter cited as Board) is directed by § 1633 of the Truth in Lending Act to grant exemptions from the requirements of Chapter 2 of that Act to any class of credit transactions within any State when the Board finds that those transactions are subject to substantially similar State requirements and that there is adequate provision for enforcement.

Appellant contends that this section requires that when the Board grants an exemption for any class of transactions, it must exempt that class from all provisions of Chapter 2. Anything less constitutes a "partial exemption" in appellant's terms, and appellant argues that there is no authority for the granting of such partial exemptions.

Appellant's argument misses the point. It is based on the contention that the Act requires that any exemption granted must cover all provisions of Chapter 2. However, a careful reading of § 1633 indicates that an exemption does not extend to all provisions of Chapter 2. Chapter 2 of the Truth in Lending Act

contains provisions relating to disclosure and rescission requirements as well as to civil liability. Section 1633 states:

> "The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement." (emphasis supplied)

The plain meaning of § 1633 is that exemptions from the requirements of Chapter 2 are to be granted. The requirements of Chapter 2 cannot reasonably be construed to include § 1640 which provides the remedy of civil liability and, as such, imposes no requirement on any class of credit transactions. "It is a well-settled principle of statutory construction that the plain meaning of a statute offers the primary guidance to its meaning." American Airlines, Inc. v. Remis Industries, Inc., 494 F. 2d 196, 198 (2d Cir. 1974).

Therefore, § 226.12(c)(1) of Regulation Z, which limits the exemptions granted to the requirements of Chapter 2 without disturbing the remedy of civil liability, is proper in that it accurately expresses the will of Congress as plainly expressed in § 1633.

B. Assuming Arguendo That The Plain Meaning Of 15 U.S.C. § 1633 Is Unclear, The Board Has Broad Regulatory Authority To Interpret The Act And Effectuate Its Purposes, And 12 C.F.R. § 226.12(c) Is A Valid Exercise Of That Authority.

The Board was granted authority to develop regulations in § 1604 of the Truth in Lending Act. In addition to the authority

normally given to administrative agencies to "carry out the purposes of the Act," Congress specifically stated:

> "These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or the evasion thereof, or to facilitate compliance therewith." (15 U.S.C. § 1604)

Judicial authorities have recognized the wide breadth of this grant of authority as well as the validity of the grant. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365 (1973) (cited by appellees in their brief at pp. 5-6); Bone v. Hibernia Bank, 493 F. 2d 135, 138 (9th Cir. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F. 2d 971, 976 (5th Cir. 1974).

1. Statutory Analysis Of § 1633 Indicates That Retention Of Federal Jurisdiction Is Essential To The Fulfillment Of The Congressional Purpose.

As discussed in Section A, it is our contention that the meaning of § 1633 is clear and that 12 C.F.R. § 226.12(c)(1) correctly implements this clear meaning.

However, assuming arguendo that § 1633 is unclear, the Court should look to the intent of Congress in interpreting the statute. In this regard, the Court should note that the Board has the authority, indeed the duty, to interpret and clarify the statute. If there is a rational basis for the Board's interpretation, such interpretation should not be overturned. Rochester Telephone Corp. v. United States, 307 U.S. 125, 146 (1939).

If the Court were to adopt appellant's constructions of § 1633, it would result in unintended disparities in the liability to which various creditors operating within Connecticut would be subject. Section 1633 speaks of the exemption of "classes of credit transactions" and clearly contemplates that when exemptions are granted the result may be that some creditors within an exempted State will be governed by State requirements while others remain subject to Federal requirements. However, it seems doubtful that Congress intended that Federal jurisdiction remain for some creditors and not for others; if this were the case, different creditors would be subject to different types of remedies and actions. For example, the Connecticut exemption does not extend to transactions in which a Federally chartered institution is a creditor.[1/] The unfairness of subjecting Federally chartered creditors to class actions certifiable by a Federal forum while exempted State charted creditors who compete with them were not subject to such actions is obvious. This problem is avoided if it is accepted that Congress intended Federal jurisdiction to continue for all creditors after exemption.

1/ 12 C.F.R. § 226.12--Supplement III(e).

(e) Connecticut: Except as provided in § 226.12(c), all classes of credit transactions within the State of Connecticut are hereby granted an exemption from the requirements of Chapter 2 of the Truth in Lending Act effective August 1, 1970, with the following exceptions:

(1) Transactions in which a Federally chartered institution is a creditor;

(2) Consumer credit sales of insurance by an insurer;

(3) Transactions under common carrier tariffs in which the charges for the services involved, the charge for delayed payment and any discount allowed for early payment are regulated by a subdivision or agency of the United States or the State of Connecticut.

Congress' intention that Federal court jurisdiction continue after the granting of an exemption is also apparent in the separate determinations that it directed the Board to make before granting an exemption. Section 1633 provides that exemptions are to be granted when the Board determines

> "that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement." (15 U.S.C. §1633)

The first clause of the above-quoted portion directs the Board to determine whether under the laws of that State that class of transactions is subject to substantially similar requirements. However, the second clause, requiring a determination that there is adequate provision for enforcement, makes no reference to an analysis of State law. It is clear from the wording of the first clause that if Congress had intended to limit enforcement provisions to State law, it knew how to do so. The logical implication is that Congress did not intend to so limit the enforcement provisions; on the contrary, Congress intended that Federal jurisdiction would continue and would be one of the means of enforcement even after the granting of an exemption.

2. Congress Placed Heavy Reliance On Civil Actions And Federal Jurisdiction To Enforce Compliance With The Act, And Should Such Jurisdiction Lapse, The Federal Reserve Board, Without Civil Procedure Expertise, Would Have To Undertake Extensive Studies Of State Civil Procedures.

Section 1633 instructs the Board that exemptions are to be granted only if the Board finds that there is "adequate provision

for enforcement." Congress considered Federal court jurisdiction essential to enforcement under the Act, as is evident in the broad grant of concurrent jurisdiction contained in § 1640(e). The bills passed by the Senate and House, while differing in many respects, both provided for concurrent State and Federal jurisdiction (see S. 5, 90th Cong., 1st Sess. § 7 (1967); H.R. 11601, 90th Cong., 1st Sess. § 206(a)(3) (1967)). The Senate relied so heavily on civil actions as a means of enforcing compliance that it made no provision for administrative enforcement:

> "The enforcement of the bill would be accomplished through the institution of civil actions.... The committee has not recommended investigative or enforcement machinery at the Federal level, largely on the assumption that the civil penalty section will secure substantial compliance with the Act." S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967).

The procedural advantages of Federal jurisdiction include simplified pleading rules and class actions. Class action liability in particular has long been recognized as a crucial enforcement measure for Truth in Lending. During the comment period for 12 C.F.R. § 226.12(c), the Board received a letter from the Federal Trade Commission (January 19, 1970, signed by Joseph W. Shea, Secretary) expressing the Commission's views on the proposed regulation and emphasizing the importance of class action liability for Truth in Lending enforcement.

> "The necessity to preserve access to the Federal courts for civil suits under Truth in Lending is underscored by the fact that one of the most effective vehicles for consumer protection, the class action suit under Rule 23 of the Federal Rules of Civil Procedure, appears to be perfectly suited for the type of actions brought under

> Sections 130 and 131 of the Act.... An exempted State which satisfied the minimum requirements for administrative and criminal enforcement but had no class action provisions in its statutes would have a far less effective enforcement program than a State still operating under the Federal statute."

Many State civil procedure codes do not provide for class action liability. (It is our understanding that such is the case in Connecticut; see Connecticut General Statutes, Title 52.) Among those that do, few are as comprehensive as Rule 23 of the Federal Rules of Civil Procedure; in addition, the boundaries of many State class action procedures have not yet been judicially described. Regardless of how comprehensive a State's civil procedure protections are, to eliminate Federal jurisdiction through the exemption process would be to substantially lessen the adequacy of Truth in Lending enforcement potential. Truth in Lending is above all a consumer protection statute. Part of the protections the Congress afforded consumers under the Act was the privilege of choosing between judicial forums. To accept appellant's construction of the Act is to eliminate that Congressionally mandated privilege of choice.

The advantages to the consumer and for enforcement generally resulting from concurrent State and Federal jurisdiction has been judicially recognized:

> "Implementation of the Act's policies may indeed be greatly facilitated by preservation of concurrent State and Federal jurisdiction over civil actions in exempted states, since private suit is obviously meant to furnish the major impetus to and means of enforcing Truth in Lending requirements, cf. Ratner v. Chemical Bank New York Trust

> Co., 329 F. Supp, 270, 280 (S.D.N.&. 1971), and the consumer plaintiff with a choice of forum has the distinct incentive of being able to elect whichever forum he considers in a position to resolve his claim more expeditiously and under more advantageous procedures." Wolf v. The H. P. Hallock Co., Civil No. 15,675 (D. Conn. 1973).

In view of the Congressional reliance on Federal jurisdiction and civil liability as a means of enforcing compliance with the Act, there is strong support for the conclusion that Congress intended that Federal jurisdiction remain after the granting of an exemption.

Further, if appellant's argument that Congress intended Federal jurisdiction to lapse after the granting of an exemption were accepted, it would mean that in order to insure that there is adequate provision for enforcement, the Board would have to determine if it provided as broad protections to consumers as Federal civil procedure does. It would have been illogical for Congress to have required that the Federal Reserve Board undertake such a study in an area in which its expertise is limited; and for the Board to require a State to be able to demonstrate as adequate and effective a civil procedure would probably preclude the granting of any exemption for several years, thus substantially ignoring an express Congressional mandate.

> "[N]ecessarily prerequisite to total Federal withdrawal from enforcement efforts in any state would be in part, the Board's determination that the state's judicial framework and applicable

civil procedures adequately provided for enforcement of credit disclosure standards through private suits, cf. 15 U.S.C. § 1633; the Board could reasonably have concluded that Congress had not invited a Federal administrative body to undertake the potentially invidious task of attempting thorough assessment of the comparative merits of a state's judicial arm, and certainly could have assumed that Congress would not sanction the only genuine alternative, a merely perfunctory approval." Wolf v. The H. P. Hallock Co., Civil No. 15,675 (D. Conn. 1973) (emphasis supplied)

3. Continuation Of Federal Jurisdiction Promotes The Purposes Of Truth In Lending As Expressed In § 1601 Of The Act.

The essential purpose of the Truth in Lending Act is to provide consumers with meaningful disclosures of credit terms to encourage them to shop for credit and avoid the uninformed use of credit (§ 1601). Uniformity in the enforcement of provisions of the Act is therefore essential if the Congressional objective of nationally comparable, meaningful disclosures is to be achieved. Without uniformity in enforcement, distortions in the complicated calculation of rates could readily occur, thereby thwarting this important Congressional purpose. To deal with this problem on the administrative enforcement level, the Board continuously monitors States which have received exemptions to insure that the test of substantial similarity in disclosure requirements contained in § 1633 is continually maintained.

Similarly, Federal court jurisdiction has long been recognized as an important tool for insuring nationwide uniformity of enforcement.

> "The Federal courts have acquired a considerable expertness in the interpretation and application of Federal law....
>
> "[S]ome lack of uniformity as to the meaning and application of Federal law is inevitable. There is reason, however, to believe that greater uniformity results from hearing these cases in a federal court....
>
> "It would seem a priori that lack of uniformity in the application of Federal law stemming from misunderstandings of that law, and the body of decisions construing it, would be less in the Federal courts than in the state courts....
>
> "Uniformity in application of Federal law... require[s] that Federal district courts have original jurisdiction of some, at least, of... [federal question] cases." Study of the Division of Jurisdiction Between State and Federal Courts, as adopted by the American Law Institute, pp. 164-165, 165-166, 168 (1969).

Thus, it is asserted that the disclosure requirements of Truth in Lending must be uniformly enforced in order to achieve the Congressional purpose of encouraging informed, comparative shopping for credit. The Federal court jurisdiction promotes this uniformity of enforcement:

> "In order to allow States to operate under their own statutes and at the same time maintain the desired level of enforcement, there must remain available some forum which will apply to consumers and creditors of all States the same procedural guarantees and uniform interpretations. Such a forum is the Federal courts...."
> FTC Letter to the Honorable J.L. Robertson,

January 19, 1970, signed by Robert W. Shea, Secretary.

Regulation 12 C.F.R. § 226.12(c), by clarifying that Federal jurisdiction continues after the granting of an exemption, fosters uniformity of enforcement and thus is reasonably related to the purposes of the Act. Therefore, it should not be overturned. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973).

4. If Appellant's Argument Is Accepted, One Must Also Conclude That Congress Intended To Exclude Federal Jurisdiction On The Basis Of § 1640(e) Without Addressing Alternative Bases For Such Jurisdiction.

If Congress had intended for Federal jurisdiction to lapse, it would have expressly stated so. The mere termination of the jurisdiction provided under § 1640(e) would in no way defeat other statutory provisions establishing Federal jurisdiction for Truth in Lending actions. For example, it has been held in at least two Truth in Lending actions that Federal jurisdiction lies on the basis of Commerce clause jurisdiction, 28 U.S.C. § 1337. Sosa v. Fite, 465 F. 2d 1227, 1229 (5th Cir. 1972); Littlefield v. Walt Flanagan and Company, 498 F. 2d 1133, 1135 (10th Cir. 1974). Since § 1337 imposes no additional jurisdictional requirements, all Truth in Lending actions may be brought in Federal courts regardless of § 1640(e); we cannot assume that Congress intended to engage in the futile exercise of withdrawing

Federal jurisdiction under § 1640(e), while leaving a coextensive grant of jurisdiction in 28 U.S.C. § 1337. The result of such a futile exercise would be to create confusion regarding the civil liability provisions of the Act. Moreover, § 1640, as amended by P.L. 93-495, contains seven subsections giving detailed guidance to the courts on such issues as class action liability, good faith compliance with Board regulations, and liability for multiple failures to disclose. To accept appellant's contention would result in the loss of this statutory guidance for no apparent reason.

5. Truth In Lending, As A Remedial Statute, Is To Be Interpreted Liberally And The Board's Interpretation Of The Act Is Entitled To Great Deference.

In N.C. Freed Co., Inc., v. Board of Governors of the Federal Reserve System, 473 F. 2d 1210 (2d Cir.), cert. denied 414 U.S. 827 (1973), the Court in responding to a similar contention that the Federal Reserve Board had exceeded its authority in prescribing a regulation broadly defining "security interests," stated:

> "The [Truth in Lending] Act is remedial in nature, designed to remedy...unscrupulous and predatory creditor practices throughout the nation. Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated. See Peyton v. Rowe, 391 U.S. 54, 64-65 (1968); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)." (emphasis supplied)

The substantial amount of statutory evidence previously cited supports the Board's interpretation of § 1633 that jurisdiction

of Federal courts remains (and was intended by Congress to remain) after the granting of an exemption. Even if the evidence supporting the Board's interpretation of that section were less substantial, the Board's status as the principal regulatory implementor of the Act calls for great deference to be paid to its interpretive regulations:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its adminstration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result that we would have reached had the question arisen in the first instance in judicial proceedings.' (Citing Cases) 'Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Udall v. Tallman, 380 U.S. 1, 16 (1965).

The Board's Regulation 12 C.F.R. § 226.12(c), entitled to great deference, has a rational basis, correctly interprets the Act, and aids in effectuating the Congressional purpose. The Board did not exceed its statutory authority in promulgating Regulation 226.12(c) which clarifies § 1633 in accordance with the Board's interpretations of the Congressional intent.

> "The challenged regulation constitutes a clarification and not an imporper extension, of the Statute, and it therefore does not exceed the bounds of the mandate given the Board by Congress. Since the regulation is clearly consistent with the legislative purpose,

it may not be overturned." N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System, 473 F. 2d 1210, 1217 (2d Cir.), cert. denied 414 U.S. 827 (1973) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)). (emphasis supplied)

C. Contrary To Appellant's Contention, The Board Took Great Care To Insure That 12 C.F.R. § 226.12(c) Did Not Exapnd Federal Jurisdiction As Created By The Congress.

Obviously, the preceding arguments are not intended to imply that the Board has unlimited discretion to do anything it pleases by regulation. Certainly we do not contend that the Board has authority to expand or contract judicial jurisdiction. The Board has paid careful attention to the authority granted to it by the Act and in promulgating 12 C.F.R. § 226.12(c) has scrupulously avoided taking any action which is outside that authority.

The appellant's argument that the Board exceeded its authority seems to be that no power was given to the Board which allows it to grant "partial exemptions." It follows, according to appellant, that any exemption granted under Chapter 2 must extend to all provsions of that Chapter, including § 1640. However, it has already been demonstrated that § 1633 provides for the granting of exemptions only from the requirements of Chapter 2, whereas § 1640(e) is in the nature of a remedy. Thus, the exemption is not partial but rather is exactly the total exemption envisioned by § 1633. The assertion that the Board

created Federal jurisdiction in 12 C.F.R. § 226.12(c) cannot be supported since the jurisdiction remained unaffected by the exemption.

The history of 12 C.F.R. § 226.12(c)(2) evidences the great care exercised by the Board to assure that it did not go beyond its statutory authority and create Federal jurisdiction. As proposed for comment, 12 C.F.R. § 226.12(c)(2) read as follows:

> "After an exemption has been granted, the disclosure requirements of the applicable State law shall be the disclosure requirements of this Act, and information required under such State law shall, accordingly, be the 'information required under this Chapter' (Chapter 2 of the Act) for the purposes of section 130(a)." Proposed Reg. 12 C.F.R. § 226.12(c)(2), 34 Fed. Reg. 20065 (1969).

The Board received numerous comments pointing out that such a regulation would clearly extend Federal jurisdiction to cases charging a violation of a State disclosure requirement which was not a disclosure requirement of the Truth in Lending Act as passed by Congress. The Board considered these comments and accordingly changed the Regulation so that Federal jurisdiction was not extended. The Regulation adopted is as follows:

> "After an exemption has been granted, the disclosure requirements of the applicable State law shall constitute the disclosure requirements of this Act, except to the extent that such State law imposes disclosure requirements not imposed by this Act. Information required under such State law with the exception of those provisions

> which impose disclosure requirements not imposed by this Act shall, accordingly, constitute the 'information required under this Chapter' (Chapter 2 of the Act) for the purpose of section 130(a)." (12 C.F.R. § 226.12(c)(2)) (emphasis supplied)

The Board's drafting of its Regulation so as not to expand Federal jurisdiction illustrates the careful analysis that preceded the issuance of 12 C.F.R. § 226.12(c). The Regulation does not create or expand Federal jurisdiction. Federal jurisdiction does not continue as a result of the Regulation; it would have continued even without it. The Regulation merely interprets and codifies the meaning of § 1633 so as to avoid disputes resulting from any lack of clarity in the expression of Congress' intent as expressed in the Act.

> "The challenged regulation constitutes a clarification, and not an improper extension, of the statute.... Since the regulation is clearly consistent with the legislative purpose, it may not be overturned." N.C. Freed Co., v. Board of Governors of the Federal Reserve System, 473 F. 2d 1210, 1217 (2d Cir.), cert. denied 414 U.S. 827 (1973) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)).

D. Appellant's Construction Of The Statute, If Accepted, Leads To An Unconstitutional Delegation Of Authority To The Federal Reserve Board.

In reality, the position advanced by appellant that Congress intended the Board to grant exemptions which include § 1640 in their coverage would, if accepted, grant to the Board precisely the power that appellant argues the Board does not have. Appellant's argument seems to be that although Congress created Federal jurisdiction over Truth in Lending suits, it somehow delegated to the Board the authority to withdraw Federal jurisdiction by granting an exemption. This is a novel position.

In Title 15 U.S.C. § 1640(e), Congress established the jurisdiction of United States District Courts to redress violations of the Truth in Lending Act. Congress' authority to create this jurisdiction--and to withdraw it--is supreme and exclusive. Constitution, Article III, Section 1; Shelden v. Sill, 49 U.S. (8 How.) 441, 448-449 (1850); Lockerty v. Phillips, 319 U.S. 182, 187-188 (1943).

Courts are barred from countenancing any limitation, modification, or repeal of the jurisdiction so created unless Congress speaks with an unmistakeable voice; "repeals by implication are not favored." Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972) (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

Appellant contends that the Board was given the power to withdraw Federal jurisdiction by granting an exemption. Nowhere in the Act is it expressly stated that the Board has the power to do this and it surely cannot be said that Congress has given the Board this authority with an unmistakeable voice. Even if Congress had expressly

delegated this authority to the Board, such delegation would be unconstitutional. A.L. Schecter Poultry Co. v. United States, 295 U.S. 495 (1935). Assuming such delegation were constitutional, it would be highly illogical for Congress to delegate to the Federal Reserve Board, a body with no special expertise in the area of civil procedure, the authority to withdraw Federal jurisdiction. It is a well recognized principle of statutory construction that interpretations which involve serious constitutional difficulties are to be rejected in favor of interpretations which are not so impaired. 2 A Sutherland, Statutes and Statutory Construction § 45.11 (4th ed. 1973). Therefore, one must conclude that the Board correctly interpreted the Congressional intent that Federal jurisdiction remain after the granting of an exemption.

E. The Legislative History Cited By Appellant Is Irrelevant In That It Does Not Address Federal Court Jurisdiction; But Congressional Action Subsequent To The Passage Of Truth In Lending Supports The Contention That Congress Agreed With The Board's Interpretation Of 15 U.S.C. § 1633.

1. The Legislative History Discussed By Appellant Fails To Establish That Congress Intended Federal Jurisdiction To Lapse After The Granting Of A § 1633 Exemption.

In support of its contentions, appellant cites legislative history from Senate hearings on S. 5[2/] as well as Senate Report No. 392 (supra), the Banking Committee's report to the Senate following the cited hearings.

2/ Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. (1967).

Much of the language cited by appellant refers to problems raised during the Senate's deliberations concerning Federal enforcement of the proposed Act. Appellant argues that in referring to the problem of Federal enforcement, the Congress was intending to reference judicial as well as administrative enforcement of the Act. However, our reading of the Senate legislative history on S. 5 (supra) indicates that the primary and overriding aspect of this enforcement problem was not judicial enforcement but rather administrative enforcement of the Act. As mentioned in section A.2 above, in discussing this enforcement problem, the Senate Banking Committee at page 9 of Report No. 392 states:

> "The Committee has not recommended investigative or enforcement machinery at the Federal level, largely on the assumption that the civil penalty section will secure substantial compliance with the Act."

Appellant also cites Senator Bennett in connection with his concern over the Federal Truth in Lending law preempting existing State law, and interprets these remarks again to be directed toward Federal court enforcement. However, it should be noted that on page 24 of Report No. 392, Senator Bennett states:

> "I have been concerned over the past seven years that Federal legislation would, by moving into a field heretofore reserved to the States, preempt State law and thus cause State <u>legislative</u> and <u>administrative</u> bodies to give up one more of their responsibilities to the central government." (emphasis supplied)

Appellant also cites Governor Robertson's testimony before the Senate Subcommittee on Financial Institutions of the Banking

Committee (supra p. 659) in support of its contention that Federal judicial jurisdiction was intended to be revoked in the exemption process. Again, appellant has interpreted too broadly the remarks made concerning the enforcement problem. A more careful reading of Governor Robertson's testimony indicates that his major concern regarding enforcement of the Act was the potential burden the Board might be called upon to bear in assuring compliance through administrative enforcement. For example, Governor Robertson, at pages 679-680 of his testimony on S. 5 states:

> "The Board has no objection to drafting the regulations and to informing the public about them but the big job under this is going to be the handling of complaints and prosecution....
>
> "We [the FRB] should not be obliged to investigate all of these complaints to ascertain whether or not there is a violation....
>
> "All we are trying to do is to make it very clear that the Board does not want the job of enforcing the statute."

Nowhere in the course of the Senate hearings (supra) or the Senate Committee Report (supra) do we find specific reference to a concern with Federal juridical enforcement of the statute. We interpret Governor Robertson's remarks to be a plea that the Federal Reserve Board alone not be saddled with the responsibility of insuring administrative enforcement of the statute.

Appellant also suggests that the exemption process outlined under § 1633 of the Act was intended by the Congress to be sweeping

in effect. Appellant points out at page 13 of its brief that it is not aware of any statement in the legislative history suggesting that concurrent jurisdiction of Federal and State courts was contemplated by the exemption provision. It points out at page 6 of its brief that nowhere is there any modifier of the word exemption or any other suggestion that an exemption could somehow apply only to certain provisions and that the choice of the word exemption "contemplated immunity from the reach of the Federal law."

In contradiction, we would point out that Senate Report No. 392 (supra) at page 8 states: "Section 6(b) of the Act would give the Federal Reserve the authority to exempt creditors from complying with all or parts of the bill if substantially similar disclosure provisions were contained in State law." (emphasis supplied)

Furthermore, we wish to reiterate a point made by appellee highlighting the fact that appellant has ignored subsequent legislative history in reference to House action taken in regard to Truth in Lending. Responding in part to Governor Robertson's concern over the administrative enforcement burden, the Senate made no provision in S. 5 (supra) for administrative enforcement. However, the House at § 207 of H.R. 11601 (supra) provided for administrative enforcement lodged in nine Federal regulatory agencies. The House's view of the issue of administrative enforcement ultimately prevailed as may be seen in the administrative enforcement provisions of § 1607 of the Truth in Lending Act.

Thus, appellant's assertion that the legislative history establishes that Congress intended Federal jurisdiction to lapse after granting an exemption is unpersuasive and not supported by the facts. The legislative history which appellant cites is irrelevant to the issue of judicial enforcement and oblivious to subsequent legislative action in the House.

2. Congressional Action Subsequent To The Passage Of Truth In Lending Indicates That Congress Has Concurred In The Board's Interpretation Of § 1633 As Codified In 12 C.F.R. § 226.12(c).

Subsequent statutory amendments related to §§ 1633, 1640, and 12 C.F.R. § 226.12(c) indicate that Congress comprehended and approved of the Board's interpretation of § 1633 to the effect that Federal jurisdiction would not be withdrawn as a result of a grant of exemption from the substantive requirements of the Act.

Following the publication of 12 C.F.R. § 226.12(c) for comment, the Board at page 5 of its Annual Report to Congress for the Year 1969 [3/] specifically informed the Congress of its actions with respect to the State exemption process.

> "The Board believes that after an exemption for classes of transactions within a State has been granted, customers should have continued access to Federal or State Courts in seeking redress for alleged violations of the disclosure provisions of State statutes, including the right to rely upon Federal or State rules relating to class actions."

3/ Board of Governors of the Federal Reserve System Annual Report to Congress on Truth in Lending for the Year 1969 (1970).

Subsequent to this communication, the Board formally adopted 12 C.F.R. § 226.12(c) on March 12, 1970, and thereafter began granting exemptions to various qualifying State applicants, including Connecticut on August 1, 1970.

At no time during this period or subsequently did the Congress voice any criticism of the Board's interpretive action, despite ample opportunity during continuing oversight hearings. Moreover, the Congress has likewise failed to alter directly or by inference the original language of § 1633 or § 1640(e) of the Act, despite the fact that on two separate occasions the Congress has formally amended the Act. The first statutory amendments (P.L. 91-508) were enacted on October 26, 1970, less than six months after the effective date of 12 C.F.R. § 226.12(c). The second statutory amendments were enacted as P.L. 93-495 on October 28, 1974. Title IV of this latter statute specifically amended § 1640 of the Act in three sections and addressed the issue of class action liability. Yet none of these statutory amendments made any change in the concurrent jurisdiction or State exemption provision in the original Act as implemented by 12 C.F.R. § 226.12(c).

In addition, Title III of P.L. 93-495 (Fair Credit Billing Act) likewise amended the Truth in Lending Act with the addition of a new chapter and, at § 171(b), provided for the granting by the Board of exemptions in reference to State laws which were substantially similar to the provisions of the Federal Fair Credit Billing Act.

The provisions of § 171(b) are substantially identical to those contained in § 1633 of the original Act. Had the Congress disagreed with the view expressed in 12 C.F.R. § 226.12(c) and called to its attention in the Board's 1969 Annual Report (supra) that Federal jurisdiction survives the granting of an exemption from the substantive requirements of the Act, it can be assumed that § 171(b) would have expressly provided than an exemption should apply to procedural remedies.

Appellant contends that these statutory amendments were technical in nature and thus irrelevant to the Court's consideration. We submit to the contrary that the Congress was formally notified of the Board's interpretation of the provision for State exemption and through the subsequent statutory amending process has in effect ratified the Board's interpretation that concurrent judicial jurisdiction continues following the granting of a State exemption. We would thus urge upon the Court that the Congress has concurred with the Board's interpretation of the legislative history and statutory meaning of § 1633 and § 1640(e).

III. IF THE FEDERAL RESERVE BOARD'S REGULATION 12 C.F.R. § 226.12(c) IS FOUND TO BE AN INVALID EXERCISE OF THE BOARD'S AUTHORITY UNDER 15 U.S.C. § 1604 AND § 1633, THE EXEMPTION GRANTED CONNECTICUT AND OTHER STATES FAILS ENTIRELY LEAVING THE FEDERAL TRUTH IN LENDING LAW IN FULL FORCE AND EFFECT.

The second question asked of the Board by this Court concerns the legal result of a finding by this Court that the Board's Regulation, 12 C.F.R. § 226.12(c), is invalid. Specifically, the Court asked should the regulation in question be found invalid, would the exemption granted to the State of Connecticut fail entirely, leaving the Federal Truth in Lending Act in full force, or would the retention of Federal civil jurisdiction alone fail, leaving all claims arising within Connecticut subject solely to the jurisdiction of its courts?

We respectfully submit that if the Board's regulation is found invalid, the entire exemption granted to Connecticut is likewise invalid and must fail since the basis for the Board's determination that the exemption was justified would have disappeared. This would also be true for the four other State exemptions.

As indicated above, the Board interpreted § 1633 and § 1640(e) of the Act to mean that Congress intended for Federal court jurisdiction to continue following the grant of an exemption. The Board did not believe that the Congress could have intended for it, with its limited expertise in matters relating to civil procedure, to undertake a comparative analysis of the procedural rights granted under various State procedural codes with those

with those granted under the Federal Rules of Civil Procedure. Therefore, the Board undertook no analysis of Connecticut's civil procedure prior to the granting of Connecticut's exemption.

Should this Court determine that Federal court jurisdiction is lost with the granting of an exemption, a detailed analysis of Connecticut's civil procedure rules would be essential to a determination of whether or not transactions in Connecticut should be exempted. Since the previous exemption was granted without such an analysis, it would necessarily lack validity.

IV. IN REFERENCE TO SUBSTANTIVE DISCLOSURE QUESTIONS AT ISSUE, THE COURT'S ATTENTION IS DIRECTED TO PUBLIC INFORMATION LETTER #444 OF THE STAFF OF THE FEDERAL RESERVE BOARD.

Finally, the Court has asked for the Board's views, time permitting, with respect to the substantive disclosure questions at issue in this case. The time granted by the Court for filing has not permitted the Board sufficient opportunity to review the substantive issues related to the disclosure violations alleged by appellee. We have noted, however, that several opinion letters written by the Board's staff are at issue in these allegations. For whatever aid it may be to the Court, we would point to the Board's official view as to the legal status of opinion letters written by its staff regarding Truth in Lending disclosures. This view may be found in Public Information Letter #444,[4/] signed by Mr. Kenneth A. Kenyon, Deputy Secretary to the Board on March 1, 1971. The letter states in part:

> "A staff opinion letter represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide opinions on regulatory provisions, an essential part of its operation.
>
> "It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may

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4/ CCH Consumer Credit Guide ¶ 30,640.

be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board."

APPENDIX

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Board of Governors of the
Federal Reserve System,
21st & Constitution Avenue, N. W.,
Washington, D.C. 20551

JAN 19 1970

Attention: Honorable J. L. Robertson,
Vice Chairman.

Gentlemen:

This is in response to a request contained in the Board's December 16, 1969 press release for comments on a proposed amendment to Regulation Z of the Truth in Lending Act. The proposed amendment would preserve the right of consumers to file civil actions in either Federal or State courts after the Board exempts certain State credit transactions from the Federal Truth in Lending Act.

The Commission urges that the aforesaid proposed amendment be adopted in its proposed form. It is the opinion of the Commission that such an amendment is essential in order to sustain the effectiveness of the civil remedies provided in the Act once State exemptions are granted.

The proposed amendment is entirely consistent with the plain wording of Section 123 of the Act which requires exempted States to have "adequate provision for enforcement." While this provision clearly contemplates enforcement by the States' own administrative machinery, it is also clear that the civil remedy created by the Statute must not be impaired in any way by State court rulings or procedures that are inconsistent with those available in Federal courts.

The necessity to preserve access to the Federal courts for civil suits under Truth in Lending is underscored by the fact that one of the most effective vehicles for consumer protection, the class action suit under Rule 23 of the Federal Rules of Civil Procedure, appears to be perfectly suited for the type of actions brought under Sections 130 and 131 of the Act. Of equal significance is the fact that both the current Administration and several members of Congress have proposed legislation to enlarge the jurisdiction of the Federal courts to

entertain consumer class actions. To allow a federally created cause of action to become exempt from this growing arsenal of Federal remedies would contradict the basic reasons for providing such a cause of action.

It is also necessary to mention the potential abuses that could flow from a complete reliance on State procedures for enforcing the Act. It has been repeatedly demonstrated to us that besides providing a means of redress for the injured consumer, Sections 130 and 131 of the Act are among the most effective deterrents of future violations by creditors. An exempted State which satisfied the minimum requirements for administrative and criminal enforcement but had no class action provisions in its statutes would have a far less effective enforcement program than a State still operating under the Federal statute. Such a result would defeat one of the primary objectives of the Act--the establishment of nationally enforced standards for consumer credit cost disclosure.

In order to allow States to operate under their own statutes and at the same time maintain the desired level of enforcement there must remain available some forum which will apply to consumers and creditors of all States the same procedural guarantees and uniform interpretations. Such a forum is the Federal courts which, for the foregoing reasons, should remain available in those States exempted from the Federal disclosure requirements.

By direction of the Commission.

Joseph W. Shea,
Secretary.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief amicus curiae for the Board of Governors of the Federal Reserve System has been served by first class mail on: William J. Egan, J. Michael Eisner, David A. Reif, 205 Church Street, P.O. Box 1832, New Haven, Connecticut 06508; William H. Clendenen, David M. Lesser, 152 Temple Street, New Haven, Connecticut 06510; Stuart Bear, 333 State Street, Bridgeport, Connecticut 06604, this 4th day of April, 1975

D. Edwin Schmelzer